Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States

FRANCISCO ROSARIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is Fed.R.Crim.P. 24(b) violated when a trial court rules that a defendant forfeits peremptory challenges that it finds were exercised in violation of the *Batson* rule?

2. If a trial court in fact has discretion to forfeit peremptory challenges exercised in violation of *Batson*, did the trial court here in fact exercise such discretion or wrongly believe that forfeiture of such challenges was a mandatory remedy?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Francisco Rosario, co-defendant Rolando Aleman and United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED FED.R.CRIM.P. 24(b)	2
STATEMENT	2
Introduction	2
Jury Selection	5
The Second Circuit's Decision	7
REASONS FOR GRANTING THE WRIT	9
A. Are Strikes Exercised in Violation of *Batson* Forfeitable?	12
B. Did the Trial Court Believe Forfeiture of Abused Strikes Was Mandatory?	15
CONCLUSION	21

APPENDIX

U.S. Court of Appeals' Summary Order/ Decision	App. 1
U.S. Court of Appeals' Denial of Rehearing	App. 12

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986) ..... *passim*

Hudson v. Michigan, 126 S.Ct. 2159 (2006) 15

McCrory v. Henderson, 82 F.3d 1243 (2d Cir. 1996) 8

United States v. Acosta, 502 F.3d 54 (2d Cir. 2007) 15

United States v. Aleman [Rosario], 286 F.3d 86 (2d Cir. 2002) 1, 9

United States v. Lopez, 484 F.3d 1186 (9th Cir. 2007) 16

United States v. Martinez-Salazar, 528 U.S. 304, 120 S.Ct. 774 (2000) 8

United States v. Ramirez-Martinez, 273 F.3d 903 (9th Cir. 2001), *cert. denied*, 537 U.S. 930, 123 S.Ct. 330 (2002) 14, 16

United States v. Schwarz, 283 F.3d 76 (2d Cir. 2002) 12

United States v. Taylor, 93 F.3d 1313 (2d Cir. 1996) 8

United States v. Torres, 128 F.3d 38 (2d Cir. 1997) 8

United States v. Walker, 490 F.3d 1282 (11th Cir. 2007) 16

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

Peetz v. State, 180 S.W.3d 755 (Tex. App. Ct. 2005) 7, 12, 16

People v. Butler, 15 A.D.3d 415, 790 N.Y.S.2d 479 (2d Dept. 2005) 13

People v. Chin, 3 A.D.3d 574, 771 N.Y.S.2d 158 (2d Dept. 2004), *lv. denied*, 2 N.Y.3d 761, 778 N.Y.S.2d 780 (2004) 14

People v. Irizarry, 165 A.D.2d 715, 560 N.Y.S.2d 279 (1st Dept. 1990) 14

People v. Johnson, 196 Misc.2d 417, 765 N.Y.S.2d 199 (Sup. Ct. N.Y. Cnty. 2003) 7, 12, 13, 14

People v. Luciano, 44 A.D.3d 123, 840 N.Y.S.2d 589 (1st Dept. 2007) 13, 14

People v. Moten, 159 Misc.2d 269, 603 N.Y.S.2d 940 (Sup. Ct. N.Y. Cnty. 1993) 17

People v. Perez, 37 A.D.3d 152, 829 N.Y.S.2d 61 (1st Dept. 2007) 13

People v. Rivers, 281 A.D.2d 342, 722 N.Y.S.2d 520 (1st Dept. 2001), *lv. denied*, 96 N.Y.2d 906, 730 N.Y.S.2d 804 (2001) 13

People v. Steans, 174 A.D.2d 582, 571 N.Y.S.2d 85 (2d Dept. 1991), *lv. denied*, 78 N.Y.2d 1013, 575 N.Y.S.2d 821 (1991) 13

People v. Willis, 27 Cal. 4th 811, 118 Cal. Rptr.2d 301 (2002) 16

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. § 371 2

18 U.S.C. § 1001 3

18 U.S.C. § 3109 15

28 U.S.C. § 1254(1) 2

Fed.R.Crim.P. 24(b) ..... *passim*

PETITION FOR A WRIT OF CERTIORARI

Francisco Rosario respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit in United States v. Aleman [Rosario] is at 2007 WL 2491033 (August 30, 2007)(summary order) (see Pet. App. 1).[1]

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 19, 2007 (Pet. App. 16). Mr. Rosario's Petition for Rehearing was denied on October 4,

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[1] Numbers in parentheses preceded by "Pet. App.," refer to the Appendix to this Petition. Those preceded by "Tr.," are to the minutes of Petitioner's trial.

2007 (Pet. App. 15). This petition is timely filed within the 90-day statutory time limitation. This Court has jurisdiction to review the judgment below on a writ of certiorari pursuant to Title 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED
FED. R. CRIM. P 24(b)

Peremptory Challenges: Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.

STATEMENT

Introduction

Petitioner Francisco ("Frank") Rosario, a highly decorated police officer, was convicted, following a jury trial, of one count of conspiracy (18 U.S.C. § 371) and

one count of making a false statement (18 U.S.C. § 1001) arising from the assault upon Abner Louima in the 70th precinct in Brooklyn, New York on August 9, 1997. The jury acquitted Mr. Rosario of a second count of making a false statement. Mr. Rosario's trial was the last of the criminal trials of several police officers in the precinct arising from the well-publicized incident. Mr. Rosario was not alleged to have been involved in the assault or to have known of it while he was present at the precinct on the night of the incident; rather, the indictment alleged that Mr. Rosario and his co-defendant, Police Officer Rolando Aleman, were present in the holding area of the 70th precinct when Mr. Louima was brought there from the precinct's first floor bathroom following the assault, and to have conspired to give false statements to federal officials regarding what they had seen that night.

Mr. Rosario appealed his conviction to the Second Circuit Court of Appeals raising several grounds, two of which are pertinent to this petition: (1) Did the trial court improperly deny Mr. Rosario's right under Federal Rule of Criminal Procedure 24(b) to exercise ten peremptory challenges when it ruled that challenges disallowed under Batson v. Kentucky were forfeited? (2) If a trial court in fact has discretion to forfeit peremptory challenges exercised in violation of *Batson*, did the trial court here in fact exercise such discretion or wrongly believe that forfeiture of such challenges was a mandatory remedy?

The court, in a summary decision, affirmed Mr. Rosario's conviction, answering both questions in the negative. The facts of the case pertinent to these questions are set forth below.

Jury Selection

The jury was selected with the assistance of juror questionnaires that the venire members filled out before reporting to the courtroom. On May 23 and 24, 2000, the court entertained challenges for cause, and then peremptory challenges. The government was assigned six challenges and the defense ten, but the defense waived one challenge in round four and one in round five, and therefore exercised a total of eight challenges (Tr. 119). After the parties had exhausted their challenges, the government lodged a Batson challenge to three of the eight defense strikes (Tr. 120). Although the government had exercised all of its six strikes against white jurors (Tr.123, 131), it argued that the defense was selectively striking black jurors, and made Batson motions (Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986)) with respect to three jurors, numbers 186, 374, and 375.

After hearing argument, the court sustained the government's Batson challenges, finding that the reasons given by the defense for the three strikes were "pretextual" (Tr. 132).[2]

Defense counsel then asked, "whether we now can use those three strikes" (Tr. 133). The court responded: "No, you can't. The law is clear, otherwise you keep doing it." Counsel attempted to continue, "Well, the problem though is this --" but the court cut him off, saying, "No, you're not allowed to do it." Defense counsel then said: "If the government had made its motion at the time the strikes occurred rather than at the end, then we may not have waived certain of our rights." The court responded, "But they're entitled to do that. They're entitled to make it at the end. One of the reasons is that it tends to show

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[2] The defense challenged the correctness of the district court's finding of pretext in the Second Circuit, but does not challenge that discretionary finding in this Petition.

a pretext because there's a pattern. At any rate, your application, if such it is, is denied" (Tr. 133).

The Second Circuit's Decision

The Second Circuit found, first, that the defense forfeited the peremptory challenges that were disallowed under Batson. Relying on a Texas state court decision, Peetz v. State, 180 S.W. 755 (Tex. App. Ct. 2005), and a New York state court decision (which in fact had been disapproved prior to the Second Circuit's decision – see discussion below), People v. Johnson, 196 Misc.2d 417, 765 N.Y.S.2d 199 (Sup. Ct. N.Y. Cnty. 2003), both of which approved of forfeiture as a sanction for a *Batson* violation on a theory of deterrence, the court stated:

> We agree, and note that it is clear that this response is entirely in keeping with both the goal of *Batson* and its clear statement that trial courts retain broad discretion to fashion an appropriate remedy for a violation of its rule, *see*

> *Batson, 476 U.S. at 99 n.* -a principle that this court has also repeatedly reaffirmed in various contexts. *See, e.g., McCrory v. Henderson, 82 F.3d 11243, 1247 (2d Cir. 1996); cf. United States v. Taylor, 92 F.3d 1313,1324 (2d Cir. 1996)* (noting that"[w]e do not minimize the importance ... of removing the possibility of racial bias on the jury. How best to do that, however, is primarily left to the broad discretion of the district court"); *see also United States v. Torres, 128 F.3d 38, 44 (1997* (holding that "the trial judge has this broad discretion because a finding of actual bias is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province") (internal citation and quotation marks omitted). Analogously, the Supreme Court held in *United States v. Martinez-Salazar*, 528 U.S. 304, 315-17 (2000), that a defendant is not denied the exercise of peremptory challenges pursuant to Rule 24(b) when she elects to use a challenge to remove a juror who should have been removed for cause.

Second, according the district court the "presumption that they comprehend the scope of their discretion" despite plain evidence to the contrary, the Second Circuit found that the trial court did not misunderstand the law at issue in applying forfeiture

as a sanction.

REASONS FOR GRANTING THE WRIT

The principal issue raised in this appeal is one of deep public interest: whether a trial court, consistent with Fed.R.Crim.P. 24(b), may forfeit the peremptory challenges of a defendant whose attorney is found to have violated the restrictions on the use of peremptory challenges imposed by Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). The secondary question is: if the trial judge in this case in fact had discretion to order that such abused strikes be forfeited, whether the court, in ordering forfeiture against Mr. Rosario, exercised its considered discretion or, instead, wrongly believed forfeiture was mandatory. Here, the two-judge panel decided in its summary order, after a nearly five year hiatus following an initial remand to the district court for proceedings not here relevant (United States v.

Aleman, 286 F.3d 86 (2d Cir. 2002)), that the trial court in fact had discretion to forfeit the abused challenges and that the court did not wrongly believe that such forfeiture was mandatory. For the reasons that follow, we suggest that the panel decided both issues incorrectly.

Federal Rule of Criminal Procedure 24(b) provides:

> Each side is entitled to the number of peremptory challenges to prospective jurors specified below...(2) *Other Felony Case.* The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.

On its face, Rule 24(b) provides that a defendant is entitled to exercise 10 peremptory challenges in a non-capital case. Here, the district court ruled that the defense had forfeited three such challenges and

the defendant was therefore permitted to exercise only seven challenges.

The Second Circuit's ruling that forfeiture of disapproved strikes is an appropriate remedy for a Batson violation and does not violate Rule 24(b) relies in part on a New York State trial level decision that has been disapproved by the First Department, and wrongly punishes the defendant for the sins of the attorney. Further, its decision that the trial court understood it had discretion to either forfeit or return the rejected strikes wrongly relies on the presumption that judges know the law when, in fact, there was no controlling law to know, and strains the clear meaning of the judge's words beyond the breaking point. The issues presented – which are of first impression – are of fundamental importance both to society as a whole and to Mr. Rosario, a highly decorated and productive

police officer who lost his career as a result of this case.

A. Are strikes exercised in violation of *Batson* forfeitable?

In finding that the trial court, consistent with Fed.R.Crim.P. 24(b), was vested with discretion to forfeit abused challenges, the Second Circuit drew upon two state court cases, Peetz v. State, supra, 180 S.W.3d 755, and People v. Johnson, supra, 196 Misc.2d 417. Both cases approve forfeiture as a sanction for a Batson violation on a theory of deterrence. The court, adopting the rationale of these state court decisions, did not meaningfully address any of appellant's arguments, including that such a rule is inconsistent with the Fed.R.Crim.P. 24(b).[3] Furthermore, by the time the court issued its opinion, the cited New York

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[3] At the time Mr. Rosario filed his brief, this same issue was fully briefed in United States v. Schwarz, 283 F.3d 76 (2d Cir. 2002), and Mr. Rosario incorporated the Batson arguments made therein. The decision in Schwarz, however, did not reach this issue.

state court case, People v. Johnson, had been disapproved by New York State's First Department in People v. Luciano, 44 A.D.3d 123, 840 N.Y.S.2d 589 (1st Dept. 2007), a case the defense duly noted to the Second Circuit in a 28(j) letter of August 14, 2007. Luciano reasons:

> Assuming without deciding that the court's reverse- *Batson* ruling was correct, we find that its remedy for the violation-not returning to defendant the peremptory challenges used to challenge jurors number one and six in addition to seating them-was error. Had the court limited its remedy only to seating jurors number one and six, a remedy routinely used by the courts (*see People v. Perez,* 37 A.D.3d 152, 155, 829 N.Y.S.2d 61 [2007]; *People v. Butler,* 15 A.D.3d 415, 415, 790 N.Y.S.2d 479 [2005], *lv. denied* 4 N.Y.3d 884, 798 N.Y.S.2d 729, 831 N.E.2d 974 [2005]; *People v. Steans,* 174 A.D.2d 582, 582, 571 N.Y.S.2d 85 [1991], *lv. denied* 78 N.Y.2d 1013, 1015, 575 N.Y.S.2d 821, 823, 581 N.E.2d 1067, 1069 [1991]), we would find it clearly appropriate. Additional remedies available to the trial courts, where seating the subject juror is not a feasible option, have been held to include declaring a mistrial and beginning jury selection anew (*see People*

> *v. Rivers,* 281 A.D.2d 342, 342, 722 N.Y.S.2d 520 [2001], *lv. denied* *591 96 N.Y.2d 906, 730 N.Y.S.2d 804, 756 N.E.2d 92 [2001]), granting the violated party an additional peremptory challenge (*People v. Chin,* 3 A.D.3d 574, 575, 771 N.Y.S.2d 158 [2004], *lv. denied* 2 N.Y.3d 761, 778 N.Y.S.2d 780, 811 N.E.2d 42 [2004]), or where a finding of jury discrimination is not made until after the conclusion of the trial, reversal of the conviction (*People v. Irizarry,* 165 A.D.2d 715, 718, 560 N.Y.S.2d 279 [1990]). However, no appellate court has approved the remedy of forfeiture following a discriminatory use of a peremptory challenge.[4] We decline to do so.

Luciano, 44 A.D. 3d at 125-26.[5]

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[4] The Court's footnote 1, inserted at this point in the text, states:

> FN1. We note that in *People v. Johnson,* 196 Misc.2d 417, 765 N.Y.S.2d 199 [Sup. Ct., Kings County, 2003], the court reinstated jurors who had been improperly struck, ruling that the peremptories used against these jurors would be forfeited. However, we decline to follow it (*but cf. United States v. Ramirez-Martinez,* 273 F.3d 903, 910 [9th Cir.2001], *cert. denied* 537 U.S. 930, 123 S.Ct.
> 330, 154 L.Ed.2d 226 [2002]).

[5] Forfeiture of strikes for the discriminatory use of peremptory challenges additionally makes the client suffer for the sins of his or her attorney. It would seem more appropriate

Quite obviously, the issue whether defense strikes found to violate Batson may be forfeited is an important one, likely to be raised repeatedly in other cases. We respectfully suggest it is worthy of this Court's review.

B. Did the trial court believe forfeiture of abused strikes was mandatory?

Additionally, the Second Circuit's conclusion that the trial court understood it had discretion to forfeit – or not forfeit – the abused peremptory challenges, relies on a rule that can logically have no application to this case – the "usual presumption" that district courts "comprehend the scope of their discretion." Slip op. at 4 & n.3. How can this

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to punish the wrongdoing attorney rather than the client. Cf. United States v. Acosta, 502 F.3d 54 (2d Cir. 2007) (Adopting rationale of Hudson v. Michigan, 126 S.Ct. 2159 (2006), court holds that remedy for a violation of knock and announce rule of 18 U.S.C. § 3109 is a civil action against the offending police officer rather than invocation of the exclusionary rule and suppression of the evidence).

presumption possibly apply to an issue never before decided in this or any other circuit court? [6]

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[6] The Eleventh Circuit recently upheld the reseating of challenged jurors and the forfeiture of abused strikes, where the balance of the venire had been discharged before the Batson violation had been declared and therefore were no longer available. United States v. Walker, 490 F.3d 1282, 1294 -1295 (11th Cir. 2007). The court surveyed the sparse law on the Batson remedy:

> The Supreme Court has also been silent on whether disqualified peremptory strikes should be replaced, leaving that question to the remedial power of the lower courts. Some courts have found replacement strikes to be appropriate. *See, e.g., United States v. Ramirez-Martinez,* 273 F.3d 903, 910 (9th Cir.2001), *overruled on other grounds, United States v. Lopez,* 484 F.3d 1186 (9th Cir.2007) (en banc) (finding that replacement strikes were properly granted when the lower court held that the *Batson* decision was very close and carefully monitored the government's use of the new strikes). Other courts have refused to grant new peremptory strikes or to dismiss the venire following a *Batson* error, finding that doing so would reward offending conduct by the striking party. *See, e.g., Peetz v. State,* 180 S.W.3d 755, 760 (Tex.App.Ct.2005) (affirming a decision to deny replacement strikes following a *Batson* error); *People v. Willis,* 27 Cal.4th 811, 118 Cal.Rptr.2d 301, 43 P.3d 130, 135, 139 (2002) (upholding trial court's refusal to dismiss remaining venire when party had engaged in

Petitioner argued before the Second Circuit panel that the trial court's statement, "No you can't [have them back], the law is clear, otherwise you keep doing it," manifested the trial court's belief that the issue was not one of discretion but of law. The court rejected this supposedly "speculative" interpretation, concluding that to read this language to reflect the trial court's belief that forfeiture is mandatory would render superfluous the words "otherwise you keep doing it." 2007 WL 2491033 at *4. This last phrase, said the court, "suggests that it elected not to reinstate the peremptory challenges for a reason no different

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racially motivated strikes against potential jurors); *People v. Moten*, 159 Misc.2d 269, 603 N.Y.S.2d 940, 947 (Sup.Ct.1993) (noting that dismissing entire venire upon a successful *Batson* challenge would reward the wrongdoer and rejecting the remedy). We decline the invitation to craft any kind of bright-line rule to circumscribe the district court's discretion, and find that the circumstances here led to a defensible approach to rectify the *Batson* violation.

than that explained in written detail by the Texas court in *Peetz*." Id.

We respectfully suggest the circuit court's logic does not withstand scrutiny. The phrase "otherwise you keep doing it," considered in complete isolation, could suggest a rational for either a permissible or mandatory rule of forfeiture – although it would appear to more clearly support a rule of mandatory forfeiture. Here, however, that phrase was not uttered in isolation but rather was used to explain why "the law is clear" "you can't [have them back]." The words "clear" and "can't" should be given their normal meanings, not a strained interpretation that morphs "clear" into "discretionary" and "can't" into "perhaps won't". The phrase "otherwise you keep doing it" is hardly superfluous under this interpretation, as the panel asserts; rather, it explains why the court

believed the law "clear[ly]" says you "can't" have them back.

Additionally, the circuit court decision omits any mention at all of the balance of the colloquy, which further undermines its analysis. After the trial court ruled, "No, you can't. The law is clear, otherwise you keep doing it," defense counsel attempted to continue, "Well, the problem though is this --" but the court cut him off, saying, "No, you're not allowed to do it" (Tr. 133) (emphasis added). This last comment further manifests the trial court's belief that forfeiture was required as a matter of law, and dispels any lingering doubt about the court's view of the applicable rule.

Had the learned trial judge believed its decision was discretionary, unquestionably he would have engaged counsel in a discussion of the factors he believed relevant to a considered exercise of that

discretion. Instead, the judge not only used language clearly manifesting his belief that his decision was required as a matter of law, but the judge also cut off discussion in a manner that evidenced his belief that discussion would be superfluous. In short, the court's decision that the trial court recognized and exercised its discretion enjoys no support whatsoever in the record.

Petitioner Frank Rosario awaited the Second Circuit's decision for nearly five years, having lost his chosen career as one of the city's most productive police officers. The issues we raise are of profound public importance and of obvious significance to him. We respectfully suggest that the Second Circuit incorrectly decided that forfeiture of strikes is an option for an attorney's Batson violation, and also wrongly concluded that the trial court recognized it had discretion in the face of unequivocal language

suggesting the contrary. To the extent there was ambiguity in the court's language – and in fact there was none at all – that ambiguity should not have been resolved adversely to appellant by employing a presumption – that judges understand the law – that has no application where the law is unsettled.

Conclusion

For the foregoing reasons, this Court should grant Mr. Rosario's petition for Writ of Certiorari.

Dated: New York, New York
January 2, 2008

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 7, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)". A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/), IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, Foley Square, in the City of New York, on the 30th day of August, two thousand and seven,

Present:

Hon. Richard J. Cardamone,
Hon. Rosemary S. Pooler,
Circuit Judges.*

United States of America,

Appellee,

v.

Rolando Aleman,

Defendant,

Francisco Rosario,

Defendant-Appellant.

01-1130-cr

(Filed Aug. 30, 2007)

For Defendant-Appellant:

Raymond R. Granger & Richard Ware Levitt, New York, NY

For Appellee:

Barbara D. Underwood, Chief Assistant United States Attorney (Richard T. Faughnan, of counsel),

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* The Honorable James L. Oakes, Circuit Judge, was a member of the panel who heard this case, but he has since retired.

for Rosslyn R. Mauskopf, United States Attorney, Eastern District of New York, Brooklyn, NY

Appeal from the United States District Court for the Eastern District of New York (*Nickerson, J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of said District Court be and it hereby is **AFFIRMED**.

Defendant-appellant Francisco Rosario ("Rosario") reinstates his appeal of a judgment of conviction of the district court, entered on February 28, 2001 after a jury found him guilty of one count of conspiracy to make false statements and one count of making a materially false statement to federal authorities. 18 U.S.C. §§ 371, 1001. This court retained jurisdiction over this appeal pursuant to an earlier order remanding for fact finding on the issue of the government's purported violation of an immunity agreement, which order referred to this court's procedure for reinstatement of an appeal before the panel to which the appeal had originally been assigned. *United States v. Aleman,* 286 F.3d 86, 91-92 (2d Cir. 2002) (citing *United States v. Jacobson,* 15 F.3d 19, 21-22 (2d Cir. 1994)).

Upon remand, the district court found that no immunity agreement had existed, and even if it had, "[Rosario] would not be entitled to immunity for lies . . . because [the district court] finds that he deliberately did not tell the truth" after the purported immunity

agreement was executed. *United States v. Rosario,* 237 F. Supp. 2d 242, 258 (E.D.N.Y. 2002) (Raggi, J., sitting by designation). Accordingly, this court now must turn to the issues that remain.[1] We assume the parties' familiarity with the details pertaining to the facts, the procedural history of the case, and the specification of issues on appeal.

Rosario's first argument is that during the third phase of a *Batson*[2] analysis – initiated by the government's objection to a purportedly suspicious pattern of peremptory strikes – the district court failed to make an explicit finding of fact on the issue of trial counsel's lack of credibility after he stated reasons that the court ultimately found to be pretextual. This argument is without merit. In essence, Rosario contends that the judge failed to describe trial counsel's reasons as "incredible" when noting that "these three challenges [made by his trial counsel] were pretextual." However, in the context of a *Batson* motion, a finding that a reason advanced by an attorney is pretextual is tantamount to noting that counsel was not credible when offering a benign rationale for the exercise of the disputed peremptory challenges.

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[1] Rosario has indicated in a letter, dated September 14, 2004, that he does not appeal any issues resolved by the district court on remand.

[2] *Batson v. Kentucky,* 476 U.S. 79 (1986).

The conclusion that Rosario's trial counsel was incredible follows logically from the premise that his reasons were found to be pretextual: it is impossible for a district court to credit the testimony of an attorney as to his or her reasons for exercising a challenge and then to find the stated reason to be a pretext. When a district court finds that the reason was merely a pretext, it has – by definition – found the stated reason to be incredible. The district court may have spoken in a tactful manner so as not to embarrass counsel – and to soften the blow of a finding of invidious racial motivation.

Accordingly, this court will not require a district court to first say "you are incredible" or "you lied about your racist purpose" before finding that "the reason you advanced for the strike was a mere pretext," as "the law does not compel a ritual of words," *United States v. Purvis,* 580 F.2d 853, 857 (5th Cir. 1978). This court has noted repeatedly, and in numerous different contexts, that we will not impose the requirements of "ritualistic incantation" on district courts. *See, e.g., Malcolm v. Nat'l Gypsum Co.,* 995 F.2d 346, 354 (2d Cir. 1993); *United States v. Alessi,* 638 F.2d 466, 476 (2d Cir. 1980).

The trial court's finding that Rosario's counsel's explanation was pretextual is tantamount to a determination that such explanation was not credible. *See Barnes v. Anderson,* 202 F.3d 150, 156 (2d Cir. 1999). On appeal, we review such finding for clear error. *Id.*; *see also United States v. Biaggi,* 853 F.2d 89, 96 (2d Cir. 1988). Rosario does not argue that the

adverse credibility determination against his trial counsel was clearly erroneous, and we do not so find, as there is ample support from the record supporting the conclusion that when challenged about his reasons for striking three black jurors, trial counsel advanced pretexts – i.e., that he did not tell the truth about his actual motivations, and that what he said was not credible. Accordingly, there is no reason to disturb the district court's findings.

Rosario's next argument relates to the remedy imposed after the district court granted the government's *Batson* motion. First, he argues that it was error to rule that the peremptory strikes, which his trial counsel had used in violation of the Fourteenth Amendment against black jurors, were forfeited. In his letter brief responding to this court's order of February 23, 2005, which "t[ook] the opportunity to provide supplementary authority," Rosario states that "[w]e are not aware of any recent cases addressing whether a party forfeits peremptory challenges that have been previously exercised but disallowed under *Batson*". However, several recent cases address this issue, none of which are favorable to Rosario's position.

In *Peetz v. State,* a Texas court addressed this question in a succinct and straightforward manner:

> To hold that courts must restore the misused peremptory strikes is not only against the purpose of *Batson,* but also logically unsound. The United States Supreme Court sought to fulfill the purpose of the Fourteenth

> Amendment in guaranteeing equal protection by eliminating race as an acceptable factor in jury selection. Were we to accept appellant's rule, we would undermine *Batson,* for there would be no consequence for racially-motivated strikes. If a trial court refuses to restore misused strikes, litigants truly face a consequence and are less likely to engage in improper, racially-motivated behavior. Such a remedy, though not required, is acceptable.
>
> In short, appellant exercised his three strikes, the court invalidated two of them, and appellant must cope with losing his race-based gamble. The effect of a successful *Batson* challenge always has been that the party exercising the strikes does not enjoy the benefit of those strikes.

180 S.W.3d 755, 761 (Tex. App. 2005). A New York court held similarly, for substantially the same reasons:

> Since the goal of *Batson* is the elimination of racial discrimination in jury selection, it is counterproductive to fail to sanction purposeful discrimination in jury selection by forfeiting the disputed challenge. . . . Furthermore, denying reinstatement of the challenge is good public policy because the discriminatory use of peremptory challenges damages the integrity and fairness of the criminal justice system. In making the initial

> improper challenges, the party has violated the civil rights of the potential juror. . . . To allow reinstatement of that challenge would be wholly inconsistent with the court's objective of deterrence.

People v. Johnson, 765 N.Y.S.2d 199, 201 (Sup. Ct. 2003).

We agree, and note that it is clear that this response is entirely in keeping with both the goal of *Batson* and its clear statement that trial courts retain broad discretion to fashion an appropriate remedy for a violation of its rule, *see Batson,* 476 U.S. at 99 n.24 – a principle that this court has also repeatedly reaffirmed in various contexts. *See, e.g., McCrory v. Henderson,* 82 F.3d 1243, 1247 (2d Cir. 1996); *cf. United States v. Taylor,* 92 F.3d 1313, 1324 (1996) (noting that "[w]e do not minimize the importance . . . of removing the possibility of racial bias on the jury. How best to do that, however, is primarily left to the broad discretion of the district court"); *see also United States v. Torres,* 128 F.3d 38, 44 (1997) (holding that "the trial judge has this broad discretion because a finding of actual bias is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province") (internal citation and quotation marks omitted). Analogously, the Supreme Court held in *United States v. Martinez-Salazar,* 528 U.S. 304, 315-17 (2000), that a defendant is not denied the exercise of peremptory challenges pursuant to Rule

24(b) when she elects to use a challenge to remove a juror who should have been removed for cause.

Rosario also argues that the district court committed an error of law in failing to exercise its discretion when imposing that remedy, owing to the district court's purported mistaken belief that forfeiture of the strikes was mandatory. This argument in the alternative is also unavailing. The entire basis for Rosario's assumption that the district court did not understand the permissible boundaries of its discretion – which is clearly in tension with this court's usual presumption[3] that the district court does understand these boundaries – is the oral statement of the district judge. When asked to restore the forfeited challenges, the judge said: "No you can't [have them back], the law is clear, otherwise you keep doing it."

We are not persuaded by Rosario's speculative interpretation of this statement as evidence that the district believed that it was required, as a matter of

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[3] In reviewing a trial court's exercise of judicial discretion, "our context is that of experienced district judges, familiar with both the substantive content of relevant law and procedural requirements, who face the daunting task of administering heavy caseloads." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005). Against this backdrop, we often accord district courts a presumption that they comprehend the scope of their discretion. *See, e.g., id.* (assuming that sentencing judge has considered relevant matters absent evidence to the contrary); *United States v. Brown*, 98 F.3d 690, 694 (2d Cir. 1996) (per curiam) (applying presumption that judge understands authority to depart, which is overcome only in rare situations).

law, to rule that the peremptory strikes were forfeited. Indeed, the notion that the judge said "the law is clear" to indicate that he had no discretion would render superfluous what the district judge said with his next breath – a statement that provided a rationale for the ruling.

The district court's statement that the "law is clear" does not provide any grounds to surmise that it misunderstood the law at issue. The better reading of these words, in our view, is that the district court recognized that the law unambiguously afforded it discretion to choose a remedy in accordance with the well-established purpose behind the *Batson* rule. The district court's concise statement of the rationale underlying its remedy -- "otherwise you keep doing it" – further suggests that it elected not to reinstate the peremptory challenges for a reason no different that that explained in written detail by the Texas court in *Peetz*.

Lastly, Rosario argues that when the district court ruled that he may not specifically refer to the jury charge in his summation, it abused its discretion. However, any error committed by the District Court with respect to the summation did not prejudice Rosario. *See United States v. James,* 239 F.3d 120, 124-25 (2d Cir. 2000) (holding that a violation of Rule 30 warrants reversal only if the defendant can show he was substantially misled in forming his arguments or otherwise prejudiced).

We have considered all of Rosario's arguments and we find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court

By:

/s/ Lucille Carr

US Court of Appeals for the Second Circuit

01-1130-cr

USA v. Aleman (Rosario)

Appeal from:	EDNY (BROOKLYN)
10/4/07	Order FILED DENYING motion Petition for rehearing by Appellant Francisco Rosario, Order FILED DENYING motion petition for rehearing en banc by Appellant Francisco Rosario.